GOVERNMENT OF TAMILNADU

TRUTH ALONE TRIUMPHS

Reply to certain points raised by Justice R. S. Sarkaria Commission on Centre-State Relations

1986

Role of the Governor.

The Chairman has called for replies of the State Government to the points in regard to the abolition of the institution of Governor and on the question of deletion of Articles 153, 159, etc.

The reasons for suggesting the abolition of the institution of the Governor have been mentioned at page 26 of the Report submitted by the State Government under Part III—Role of the Governor. The main reasons are that the institution of Governor is an anachronism, owing its existence to the British Colonial System. Further, some of the Governors have misused their offices against the spirit and letter of the Constitution in order to further certain party interests. The real executive will be the Chief Minister of the State who has been elected by the people of the State. Whatever powers are exercised by the Governor can be exercised by the Chief Minister.

The State Government have suggested that there should be no area in which the Governor should act in his discretion. As the real executive is the Chief Minister, the post of the Governor may become redundant. In this view, it was suggested that the institution of Governor should be abolished.

On this basis, it was suggested that Articles 153 to 162 may be omitted. Article 153 is the Article which provides that there shall be a Governor for each State and Article 159 relates to the oath of office by the Governor. These articles are all connected with the institution of Governor and therefore, if the institution of the Governor is to go, then these articles will have to be deleted.

Article **163 :**

As regards Article 163, the question was raised in a Writ Petition (W.P. No. 1795/85) before the Madras High Court that the appointment of the Chief Minister and swearing in of the Chief Minister alone in one day and the appointment and swearing in of the other Ministers on subsequent days is not Constitutional. This contention was negatived by the Madras High Court in R. R. Dalawai v. Government of Tamil Nadu. The following portion will be relevant :—

" 69. A convention seems to have grown that a Chief Minister is normally sworn in alone, and then he applies his mind to the question as to whom he will nominate as his Council of Ministers. Now it appears that in 1977, even the Prime Minister of India was alone sworn-in on 24th March 1977 and the other Ministers were sworn-in only on 26th March 1977. There is no express provision in the Constitution that the other Ministers must also be sworn-in on the same day on which the Chief Minister is sworn-in. Taking into consideration the manner in which a Parliamentary Democracy and Cabinet system of Government normally works, and the privilege which the Chief Minister enjoys as Chief Minister to decide who shall constitute his Council of Ministers, we do not see any reasons, especially having regard to the existing Rules of Business, to take the view that the Chief Minister cannot perform any executive functions of the Government until the other Ministers are sworn-in. This is, of course, on the assumption that within such time as may be considered reasonable by the Governor the Chief Minister inform the Governor the names of the other Ministers who are to be appointed by the Governor under Article 164 (1) of the Constitution. We are therefore of the considered view that the second respondent did not suffer from any constitutional disability in taking any decisions in exercise of the executive power of the Governor prior to 14th February 1985 ".

The suggestion to make a specific provision in this behalf has been made for the reason that the other High Courts and perhaps the Supreme Court may take a contrary view and that in order to give no room for that, the suggestion to amend Article 163 was made. However, this Government agrees that the Constitution should not be over-loaded with details.

The Chairman has also stated that the general principle adopted is that the Governor will exercise his power after consulting his Council of Ministers and that the Governor is bound to consult the Council of Ministers. In Samsher Singh's case (AIR 1974 SC 2192) which the Chairman was pleased to refer, it was observed by the Supreme Court as follows :—

" 55. In making a report under Article 356, the Governor will be justified in exercising his discretion even against the aid and advice of his Council of Ministers. The reason is that the failure of the Constitutional machinery may be because of the conduct of the Council of Ministers. This discretionary power is given to the Governor to enable him to report to the President who, however, must act on the advice of his Council of Ministers in all matters. In this context Article 163 (2) is explicable that the decision of the Governor in his discretion shall be final and the validity shall not be called in question. The action taken by the President on such a report is a different matter. Th President acts on the advice of his Council of Ministers. In all other mattets where the Governor acts in his discretion he will act in harmony

with his Council of Ministers. The Constitution does not aim at providing a parallel administration within the State by allowing the Governor to go against the advice of the Council of Ministers.

56. Similarly, Article 200 indicates another instance where the Governor may act irrespective of any advice from the Council of Ministers. In such matters where the Governor is to exercise his discretion he must discharge his duties to the best of his judgment. The Governor is required to pursue such courses which are not detrimental to the State.

57. For the foregoing reasons we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vest in the executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally. The present appeals concern the appointment of persons other than District Judges to the Judicial Service of the State which is to be made, by the Governor as contemplated in Article 234 of the Constitution after consultation with the State Public Service Commission and the High Court. Appointment or dismissal or removal of persons belonging to the Judicial Service of the State is not a personal function but is an executive function of the Governor exercised in accordance with the rules in that behalf under the Constitution ".

It will be seen from the above judgment that a majority of five Judges has held that the Governor has discretion while sending a report under Article 356. The Bench has gone further and stated that Article 200 indicates another instance where the Governor may act irrespective of any advice from the Council of Ministers. This is not a desirable poisition. A Bill which has been passed by both Houses of the State Legislature should automatically be assented to by the Governor. But two Judges of the Supreme Court observed as follows :—

" 153. We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various Articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (*a*) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House ; (*b*) the dismissal of a Government which has lost its majority in the House but refuses to quit office ; (*c*) the dissolution of the House where an appeal to the country is necessitous, although in this area the Head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory. We have no doubt that de Smith's statement regarding royal assent holds good for the President and Governor in India :

' Refusal of the royal assent on the ground that the monarch strongly disapproved of a bill or that it was intensely controversial would nevertheless be unconstitutional. The only circumstances in which the withholding of the royal assent might be justifiable would be if the Government itself were to advise such a course—a highly improbable contingency—or possibly if it was notorious that a Bill had been passed in disregard to mandatory procedural requirements ; but since the Government in the latter situation would be of the opinion that the deviation would not affect the validity of the measure once it had been assented to, prudence would suggest the giving of assent '.

Thus, the majority view is that while exercising the power of assent to a Bill passed by the State Legislature, the Governor can act irrespective of the advice of the Council of Ministers. This position ought to be avoided and it should be made clear that in according assent to a Bill the Governor is bound to act always on the advice of the Council of Ministers and should have no discretionary power in this regard.

***Article* 356 :**

The State Government has already suggested that Article 356 should be omitted in view of the fact that the ruling party at the centre, whatever be the party's composition, has exercised the power against the State Governments ruled by a different party. The State Government reiterates the suggestion that Article 163 (1) should be amended as follows:—

" There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor who shall in the exercise of his functions act, in accordance with such advice :

Provided that in respect of the functions expressly conferred on the Governor under Articles 239 (2), 371 and 371-A, the Governor shall exercixse his functions in his discretion ".

The position that the Governor should act always according to the advice of the Council of Ministers is the same as set out in Article 74 (1) as amended by the Constitution (Forty-second Amendment) Act.

what the President is to the Centre, the Governor is to the State Government. This principle has been accepted by the Supreme Court in a number of cases such as Ram Jawava Kapur v State of Punjab (AIR 1955 SC 549 at p. 556) Sanjeevi Naidu v State of Madras (AIR 1970 SC 1102 at p. 1106) U. N. R. Rao v Indira Gandhi (AIR 1971 SC 1002 at p. 1005) and Shamsher Singh's case (AIR 1974 SC p. 2192).

Proposed Article 164 (1-A) :

As regards the suggestion made by the State Government for insertion of Article 164 (1-A) as a guiding principle for the appointment of the Chief Minister, the Chairman has stated that there may be difficulties in regard to the implementation of Article 164 (1-A). But the point the State Government would like to press is that the Governor should appoint the person who commands absolute majority in the Legislative Assembly and in case there is no absolute majority, the Governor should appoint a person who enjoys the confidence of the Legislature. It should not be left to the Governor to have his own discretion in the matter of appointment of Chief Minister. No doubt, there are conventions. But this Commission is well aware of how thisconvention has been violated in several instances and the Governor has sought to appoint a person as Chief Minister notwithstanding the fact that he does not enjoy the confidence of the Legislature. It is this situation which has led this Government to make the suggestion as proposed in Article 164 (1-A), the basic principle being that the Chief Minister should always be a person who enjoys the confidence of the Legislative Assembly and if that is not possible, election should follow as a democratic method.

The Chairman has pointed out that what will happen if there is a problem of law and order. It is submitted that this problem will not be peculiar to the State. There may be cases also arising at the Centre. What is the position ? The State Government's submission is that whatever position is obtaining in the Centre may obtain in the States also. The provisions relating to the appointment of the Prime Minister of India should also be made applicable to the appointment of Chief Ministers in the States.

The Chairman has made a suggestion to keep the Assembly in suspended animation. This will not be happy situation for then, it will lead to horse trading and there will be Ayarams and Gayarams crossing from one party to the other. This will be notwith standing the Anti-Defection Law embodied in the Constitution by the Constitution (Fifty-Second) Amendment Act.

Article 356 :

As regards Article 356, this Government is of the firm opinion that it should be omitted in its entirety. The eighty-seven instances which have been mentioned at pp. 34-35 of the Report submitted by the State Government will go to show that this Article has been misused and it will be a hope in vain to expect that this Article will be used only sparingly in future. In fact, Dr. Ambedkar in his Constituent Assembly speech has said that this Article will be a dead letter ; but unfortunately it is not so. It has become a very live Article for the Centre to interfere in the affairs of the State Government. Article 356 is against the basic principle of federalism and therefore it has to be deleted.

The safeguards that have been suggested by the Chairman, namely, the incorporation of clauses similar to Article 352 (7) and 352 (8) will be no safeguards at all for the reason that it is very unlikely that Parliament will disapprove the imposition of President's rule since the ruling party at the Centre will always command a majority in the Parliament.

Article 263 :

The suggestion of the State Government is to omit Article 263 which provides for the constitution of Inter-State Councils. As already submitted at p. 40 of the State Government's Report, any inter-State Council under Article 263 will have no practical value. The tenor and the language of Article 263 are such that any advice tendered, recommendations made and conclusions arrived by a Council established under it are not binding on any party and that such advices, recommendations, etc., may have persuasive value only. Further, under Article 263, an Inter-State Council has so far not been established after the lapse of 35 years since the commencement of the Constitution. It is for this reason that the Government suggested that the Inter-State Council may be abolished.

Inter-State Water Disputes.

As regards the Inter-State Water Disputes Act, 1956, the Act as it now stands is not of practical importance. Under section 4 (1) of the Act, when any request is made by the State Government in respect of any water dispute and the Central Government is of opinion that the water dispute cannot be settled by negotiations, the Central Government shall, by notification in the Official Gazette, constitute a water Disputes Tribunal for the adjudication of water dispute. Section 6 of the Act states that the Central Government shall publish the decisions of the Tribunal in the Official Gazette and the decision shall be final and binding on the parties to the dispute and shall be given effect to by them. This section 6 has not been amended subsequently. The question here is as to how to enforce the award of the Tribunal if any State Government does not give effect to the award. The 1968 Amendment to the Act does not deal with the enforceability of the award. It is for this reason this Government have suggested at p. 89 of the Report

the modification of the Act for introduction of a new provision therein enabling the parties to the dispute to secure through a known legal process the relief to enforce the awards given by the Tribunal. It has also been suggested at p. 89 of the Report that the Government of India may declare all Inter-State rivers in the country as national rivers as most of the major rivers are Inter-State in character. In the same page, it has been suggested that all disputes relating to Inter-State rivers should be referred to a permanent Tribunal constituted by the Supreme Court and that if this view is accepted, then the Inter-State Water Disputes Act, 1956 would require repeal or modification. The State Government is in agreement with the view suggested by the Chairman that Article 262 (2) may be deleted and jurisdiction may be given to the Supreme Court to decide Inter-State Water Disputes and that automatically any decision or decree of the Supreme Court will be binding. The suggestion made by the Chiarman that the matter should come to the Inter-State Council first and that the differences could be sorted out and settled and that if it could not be settled, it is mandatory on the part of the Central Government to set up a Tribunal will, it is submitted, be a time consuming process and that the defects now found in the Inter-State River Water Disputes Act, 1956 will again be repeated. For the Inter-State Council to meet it will take time ; for the Inter-State Council to arrive at a decision it will take time ; and if the Central Government is to appoint a Tribunal after being informed that the dispute could not be settled by the Inter-State Council, further time will be taken.

Article **254 :**

As regards the suggestion made by the Chairman for facts and figures in relation to the reservation of Bills under Article 254, the following are submitted :—

The basic point sought to be made by the State Government is that when a Bill is sent to the Central Government for obtaining the assent of the President on the ground of repugnancy to an existing law or to an earlier law made by Parliament with reference to Article 254 (2), virtually the Central Government sits in appeal over the Bill. There are cases where a Bill has been passed unanimously by both Houses of the Legislature and when the Governor reserves the Bill for the consideration of the President on the advice of the Chief Minister, the Bill is referred to 4 or 5 Ministries by the H me Ministry, which is the Co-ordinatory Ministry. Each Ministry takes its own time to offer its remarks nd the Bill is subjected to scrutiny from a policy and Constitutional angle. So far as policy is concerned, the State Government will be the best Judge as to what is the best policy so far as the State is concerned and it is not for the Central Government to sit in judgment over a policy decision of the State Government and adopted by the State Legislature in the form of a Bill. If this trend continues, then virtually the State Legislature will be subordinate to the Central Government which the Constitution does not envisage, at all. It is therefore submitted that the Central Government should never look into the policy angle embodied in the Bill unless it be that the Bill is dangerous to the sovereignity, integrity and unity of India.

Again, it is submitted that the Central Government sits in judgment over the Constitutionality of the issue. The question whether a particular enactment is Constitutional or not can never be answered conclusively except by the Supreme Court. Even the High Court judgment is not final and the Supreme Court may reverse or affirm the decision of the High Court and Article 141 of the Constitution states that the law declared by the Supreme Court shall be binding on all courts. If the State Government consider that the Bill is Constitutional, it should not be open to the Central Government to sit in judgment over that decision for the decision of the Central Government cannot itself be said to be final and the Constitution also does not say so. It is therefore submitted that when a Bill is reserved for the assent of the President by the Governor on the advice of the Chief Minister, the President should automatically assent to the Bill.

INSTANCES.

I. Delay in giving assent to Bills :

1. *The Industrial Disputes* (*Tamil Nadu Amendment*) *Bill*, 1981 (*Legislative Assembly Bill No.* 43 *of* 1981).—This Bill was passed by both Houses of the State Legislature and the same was reserved for the consideration of the President in Letter No. 16853/81-1, dated 10th June 1981.

Under the Industrial Disputes Act, 1947 (Central Act XIV of 1947), a reference by the Government is necessary if a dispute is to be adjudicated by a Labour Court. It is decided that when no settlement is arrived at in the course of any conciliation proceeding taken under section 2-A of the said Act, the aggrieved individual workmen shall be allowed to take the industrial dispute arising under section 2-A of the said Act in the prescribed manner to the Labour Court direct without any reference by the Government for adjudication by such Labour Court and the Labour Court shall proceed to adjudicate such dispute as if such dispute has been referred to it for adjudication and all the provisions of the Act relating to adjudication of industrial disputes by Labour Court shall apply to such adjudication. Sub-section (4) of section 11 of the said Act as it stands now does not empower the conciliation officer to summon and examine any

person for the purposes referred to therein. It is considered necessary that apart from calling for any records the conciliation officer should also be vested with the power to enforce attendance of persons and examine them on oath or to issue commissions for examination in addition to their power to compel the production of documents. The Bill sought to achieve the above objects.

The Bill was reserved on the ground that it was repugnant to the provisions of the Industrial Disputes Act, 1947 which was an existing law on a concurrent subject.

On 21st July 1981, a letter was received from the Ministry of Home Affairs stating that the Ministry of Labour who were consulted in the matter had advised that the Central Government were already considering amendments to the Industrial Disputes Act, 1947 on the same lines as proposed in the Bill by the State Government and that the State Government may consider deferring the proposal pending decision of the Central Government in the matter.

On 7th September 1981, the State Government again expressed its anxiety that the Bill should be placed on the Statute book and the benefits accruing therefrom made available to the working class as early as possible and that it may take some more time for the Government of India to bring the legislation contemplated by them.

On 1st February 1983, the Government of India informed the State Government that the Secretaries' Committee before which this Bill was placed felt that the right sought to be conferred on workmen should not have general applicability and certain categories of industries and services should be insulated from the operation of the provisions, viz., the essential services and vital sectors. The state Government was advised to consider modifying the proposal in this regard.

On 4th October 1983, the Government of India were informed that having regard to the provisions of section 2-A of the Industrial Disputes Act, which confined itself to individual disputes relating to the discharge, dismissal, retrenchment or termination of the services of an individual workman, the Bill did not cover cases of strikes and lock-outs, etc., which have wider impact upon industrial sectors. The Government of India were informed that as the Government of India had already given their concurrence to the above Bill and as the Bill had been passed by both Houses of the Legislature, the assent of the President may be expedited.

On 6th March 1984, the then Labour Minister Thiru Veerendra Patil informed the then State Labour Minister that the Sanat Mehta Committee constituted by the National Labour Conference has also made recommendation, more or less on similar lines and that they have not so far taken a decision in this regard and that till such time a decision was taken, it was not possible for them to communicate the Government of India's acceptance to the proposed amendment.

In view of the stand taken by the Government of India, this Government informed the Government of India that this Government have decided to wait till such time a decision is taken by the Government of India on the report of the Sanat Mehta Committee. Thus the Bill has been subjected to protracted correspondence. The Bill is still pending with the Government of India.

2. *The Tamil Nadu Hindu Religious and Charitable Endowments (Amendment) Bill*, 1981 (*L.A. Bill No.* 64 *of* 1981).—On 23rd September 1981, this Bill was sent to the Government of India for obtaining the assent of the President in Lr. No. 28802/81-2. The Government of India were reminded several times, viz., on 24th October 1981, 3rd December 1981, 11th January 1982, 10th February 1982 and 18th March 1982. On 17th March 1982, the Government of India forwarded the representations of Sri-La-Sri Ambalavana Pandara Sannathi Avl. raising certain objections to the provisions of the Bill and asking for the comments of the State Government. On 7th September 1982, the comments of the State Government were sent. The legal contentions raised by the Adinathar were also met. It was also pointed out that the deicision of the Madras High Court in the writ appeal had no application to the Bill in question and that an appeal has been preferred to the Supreme Court.

Again, on 17th June 1982, the Government of India have sent further representation from Sri-La-Sri Ambalavana Pandara Sannathi and asked for the comments of the State Government.

Again on 4th January 1983, the Government of India asked for the comments of the State Government and suggested that it is perhaps advisable either to await the judgment of the Supreme Court or to take such other steps to have the Madras High Court judgment reviewed.

On 2nd April 1983, this Government replied to the points raised by the Government of India and stated that the Bill was Constitutional and that the assent may be expedited. Further reminders were sent.

Again on 8th June 1983, the Government of India asked for the comments of this Government with reference to Article 26 of the Constitution. On 1st December 1983, this Government replied that the Bill does not infringe Article 26 and asked for the expedition of President's assent. The Government of India were again further reminded.

On 7th January 1984, the Government of India referred to some judgments of the Gujarat High Court and asked for comments. On 5th June 1984, it was pointed out that the Gujarat judgment had no application and asked for the expedition of President's assent. On 9th July 1984, the Government of India remarked that the Bill in so far as it relates to removal of the trustee for appointing a successor who has not the capacity to discharge his functions will infringe Article 26 of the Constitution. This Government again replied by a D.O. Letter from the Law Minister to the then Union Law Minister stating that the Bill is Constitutional and requesting for Predsident's assent, enclosing a note on the subject.

The Government of India were again reminded on 4th July 1985. On 19th August 1985, the Law Secretary of the State Government discussed the matter with the Union Law Secretary, Legal Affairs and explained the Constitutional position, pointing out that according to the judgment of the Supreme Court in Mahalinga Thambiran's case (AIR 1974 SC 199) relied on by the Madras High Court, custom could be modified by a statue and accordingly the Bill passed by the State Legislature is constitutionally valid. The then Union Law Secretary wanted the Advocate General's opinion obtained. On 2nd September 1985, the Advocate-General has been asked to give his opinion on this subject and his reply is awaited.

The Government of India's point of view is that the Bill, in so far as it relates to the removal of the trustee, for nominating a successor not having the capacity to perform the duties and functions under the Act, is not Constitutional. The Bill contains enough safeguards before removing a trustee. A suit lies to a civil court with an appeal to the High Court. This is a case where assent is being delayed as, in the Government of India's view, the Bill is not constitutional. It is submitted that this is for the Supreme Court to decide whether the Bill passed by the State Legislature is constiutitonal or not and the Government of India cannot assume the functions of the Supreme Court in deciding the Constitutionality of the Bill.

3. *The Tamil Nadu Recognition of State Register of Practioners of Indian Medicine Bill*, 1983 (*L.A. Bill No.* 14 *of* 1983).—The Bill was sent to the Government of India for obtaining President's assent on 14th February 1983.

The Register of Indian Medicine as maintained by the Tamil Nadu Board of Indian Medicine has no statutory basis and is based on only executive order issued by the State Government from time to time. The election of members representing the ayurveda, Sidda and Unani systems of Indian Medicine to the Central Council constituted under the Indian Medicine Central Council Act, 1970 (Central Act 48 of 1970) is made with reference to the "State Register of Indian Medicine" as defined in section 2 (1) (j) of the said central Act. It has been represented to the Government that unless the State Register of Indian Medicine is given statutory basis, the Medical Practioners who are Registered as on the 1st February 1983 in the said State Register will be ineligible to stand for, or vote at, the aforesaid election. It was therefore proposed to provide necessary statutory basis to the said Register of Indian Medicine by undertaking necessary legislation. The Bill sought to achieve the above object.

On 27th June 1984, the Government of India requested the State Government to give an assurance that they could make the necessary amendment in the Bill after the assent of the President is accorded to the Bill.

4. *The Tamil Nadu Building and Construction Workers (Conditions of Employment and Miscellaneous Provisions) Bill*, 1984 (*L.A. Bill No.* 44 *of* 1983).—On 8th November 1984, the Bill was sent to the Government of India for obtaining President's assent.

At present there is no separate legislation to safeguard the interests of the workers engaged in building and construction works in regard to their wages, health and safety and other working conditions. The need to enact a separate legislation in this regard has been keenly felt. The Government have, therefore, decided to enact a separate legislation to regulate the working conditions of the workmen engaged in building and construction work in this State. The Bill sought to achieve the above objects.

On 23rd March 1985, the Government of India have asked for some clarifications.

5. *The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Bill*, 1985 (*L.A. Bill No.* 44 *of* 1985).—On 31st July 1985, the Bill was sent to the Government of India for obtaining the President's assent.

In terms of the existing provisions of the Tamil Nadu Land Reforms (Fixation of Ceiling on land Act, 1961 (T. N. Act 58/61), no Public trust and educational institution can acquire any land.

Representations have been received by the Government that the above prohibition to acquire land imposed under the said Act has hampered the growth of educational institutions and hospitals. The public trusts, educational institutions and hospitals have not been able to acquire land even for bonafide purposes, that is, for the establishment or for the expansion of educational institutions and hospitals. It has, therefore, been considered necessary to amend the said Act suitably taking power for the Government to grant permission in favour of public trusts, educational

institutions and hospitals to hold or acquire land for such educational and hospital purposes subject to the conditions that may be imposed by the Government in the order granting such permission. To give effect to the above proposal, it has been decided to amend the said Act suitably. The Bill sought to give effect to the above proposal. The provisions of the Bill as introduced in the Legislative Assembly and as passed by both Houses of the Legislature were the same.

On 26th November 1985, an interim reply was received from the Government of India. The Government of India were reminded on 16th December 1985.

6. *The Tamil Nadu Urban Land (Ceiling and Regulation) Amendment Bill*, 1985 (*L.A. Bill No.* 45 *of* 1985).-On 31st July 1985, the Bill was sent to the Government of India for obtaining the President's assent.

In terms of the existing provisions of the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978 (Tamil Nadu Act 24 of 1978, public charitable or religious trusts, educational institutions, hospitals and industrial undertakings cannot sell any vacant land even for the purpose of promoting the objectives of the trust or for the purpose of expanding the educational activities of such educational institutions or preserving or maintaining the industrial growth of such industrial undertaking. Representations have been received that the prohibition to sell the whole or a portion of a vacant land held by such public charitable or religious trusts, educational institutions, hospitals and industrial undertakings, hampers the growth of the said public trusts, educational institutions, hospitals and industrial undertakings. It has, therefore, been considered necessary that in the case of public charitable or religious trust which is desirous of starting an educational institution or a hospital or to carry out the objectives of the trust, when they do not have adequate financial resources, such trusts may be permitted to transfer by way of sale, mortgage, lease or otherwise the whole or a portion of a vacant land held by it to carry out the abovesaid objectives. Such permission is to be granted by Government on application made to the Government. The permission will be subject to such conditions, as the Government may impose in the order granting the permission. Similarly, in the case of educational institutions, hospitals and industrial undertakings, it has been considered necessary that they may be permitted by Government to transfer by way of sale, mortgage, lease or otherwise the whole or a portion of the vacant land held by them so that the proceeds of such transfer may be utilised for the purpose of expanding the activities of educational institutions or hospitals or preserving and maintaining the industrial undertakings or promoting the activities of the industrial undertakings subject to the conditions imposed by Government in the order granting the permission in favour of such institutions, industrial undertakings and trusts. It has, accordingly, been decided to amend the Act suitably for the above purpose. The Bill sought to achieve the above objects. The provisions of the Bill as introduced in the Legislative Assembly and as passed by both Houses of the Legislature were the same.

On 26th August 1985, the Government of India offered some remarks. The bill is pending with the Government of India.

II. Withholding of assent:

The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Bill, 1980 (*L.A. Bill No.* 26 *of* 1980).—On 30th August 1980, this Bill sent to the Government of India for President's assent.

Clause 5 of the Bill seeks to insert a new Chapter as Chapter III-A in the principal Act. The said new Chapter III-A contains new sections 23-A to 23-G. Sub-section (1) of new sec. 23-A invalidates all transfers effected on or after 1st January 1958 and before 6th April 1960 by any person including a trust who held land in excess of the ceiling area on 6th April 1960 or any person including a trust who would have held land in excess of the ceiling area on that date but for the transfers referred to above. Sub-sect. (2) of the said sec. 23-A seeks to exempt any transfers made to any person (other than a trust) not exceeding one unit of land which is defined as five ordinary acres of dry land or two and a half ordinary acres of wet land, subject to the conditions provided therein. Sub-section (4) of the said section 23-A provides for the publication of a notification by Land Commissioner to the effect that the surplus land is required for a public purpose and on the publication of such notification, the land specified therein shall be deemed to have been acquired for a public purpose and vested in the Government free from all encumbrances. The new sec. 23-C *inter alia* provides for the application of the provisions contained in the principal Act including the provisions relating to the amount payable in respect of lands acquired under that Act. The new section 23-E provides for the constitution of a Committee consisting of the persons referred to therein, for the purpose of gathering information and particulars relating to transfers referred to in sec. 23-A (1), etc.

On 13th March 1981, the Government of India sent a letter containing the representation from the Thanjavur District Agriculturists Association and also stated as follows :—

" The examination of the Bill in various Departments of the Union Government has brought out the following points :—

(i) The Tamil Nadu Bill seeks to invalidate certain transfers made on or after 1st January 1958

and before 6th April 1960 when the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961, came into force. The proposed invalidation will be both inexpedient as a public policy and highly discriminatory in its operation. Unless there are exceptional reasons, settled rights in land should not be disturbed and it is as much an obligation of the State to prevent uncertainty in the property rights of citizens as to ensure that these rights do not operate in a manner detrimental to public good. These rights, it is obvious, should be subject to modification if such modification serves an important public purpose. In the present case, there is no information as to the public good that will be served with the proposed invalidation of the transfer under reference. The State Government have no doubt said that some big landholders are believed to have transferred parts of their holdings soon after the then Revenue Minister of the State referred to the prospect of a ceiling legislation in the Legislative Assembly some time in March 1958 but there is no information as to the scale of such transfers. The principal Act was published in the *Fort St. George Gazette*, on 2nd May 1962 but was given effect to from 6th April 1960, when the Bill was published in the *Gazette*. Transfers made after the latter date with a view to defeating the provisions of the Act were invalidated. It would thus appear that, when the principal Act was enacted, the State Government had thought that the larger number of malafide transfers can be invalidated if the Act was given retrospective effect from a date about 2 years earlier. During all these years, the State Government have not had any occasion to review this policy. To re-open, at this stage, transfers made nearly two decades ago would appear to be warranted by the amount public good likely to be served by such an extraordinary step. It is not unlikely that such a measure would only promote unsettled conditions in land rights without resulting in any tangible or substantial benefit.

(ii) As regards the discriminatory character of the Bill, a reference may be made to the Explanation to sub-clause (1) of the proposed clause 23-A according to which "transfer" does not include partition. If the then Revenue Minister's announcement in March 1958 is presumed to have occasioned large scale malafide transfers, it would be reasonable to presume that a large number of such transfers would have been through partition. If partition is not disregarded, tranfers which are no more than a legal fiction (since the land is retained with the family) are validated while transfers which may really convey the interest to another person would become void. It is natural that the larger number of malafide transfers should have taken place through the device of partition and, by its refusal to interfere with partition, the Bill will in effect discriminate against bonafide transfers while protecting malafide and collusive transfers.

(iii) As regards the legal position, the proposed amendment would fall foul of the second proviso to Article 31-A of the Constitution. As per the said proviso, it has been laid down that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure provides for payment of compensation at a rate which shall not be less than the market value thereof.

(iv) The proposed legislation in so far as it omits to make provision for payment of compensation at the market value of any estate referred to in the said proviso, infracts the guarantee afforded by the said proviso. In view thereof, the Bill to the aforesaid extent would be unconstitutional. The mere fact of inclusion of the parent Act in the Ninth Schedule (item 46) would not save the amendment proposed to be made.

In view of the consideration referred to above it may not possible to recommend to the President to grant his assent for the Tamil Nadu Bill referred to above.

On 4th May 1981, a reply was sent to the Government of India pointing out that the Bill seeks to plug out the loopholes in the Land Ceiling Legislation and to achieve real purpose of ceiling law and also pointing out that the Government of Tamil Nadu have already stated that the Bill would have to be included in the Ninth Schedule to the Constitution so that the law cannot be challenged as violative of the second proviso to clause (1) of Article 31-A of the Constitution. On 4th May 1981, the Chief Minister sent a letter to the Prime Minister. On 12th October 1981, the Deputy Secretary to the Government of India in Lr. No. 17/68/80-Judl. addressed to the Secretary to the Government of Tamil Nadu, Law Department, has stated that the President's assent was withheld. It was stated in that letter as follows :—

"With reference to your letter No. 21045/80-1, dated 30th August 1980 on the subject noted above, I am directed to return herewith two authentic copies of the Bill withholding President's assent from the Bill under Article 201 of the Constitution of India. Their

receipt may kindly be acknowledged." The Government of India in the letter, dated 22nd January 1982 stated the reasons as follows :—

"I am directed to refer to your letter No. 21045/80-9, dated 5th January 1982, on the subject cited above and to say that the matter was considered at length and the Government of India was of the view that the transactions sought to be set aside by the Bill were made nearly two decades ago. During the intervening period the land involved may have changed hands several times and the present owner in all likelyhood, would not have been a party to the malafide transaction. If small landholders and genuine cultivators are exempted, and if transactions made through partitions were exempted the residual cases will be few and will not justify the extraordinary measure the Bill contemplates. The State Government had pointed out that the scheme of partition exists in the principal Act which was enacted with the assent of the President. While this is not denied, the Government of India have, from time to time, urged the State Government to reconsider these provisions which have resulted in quite some land remaining outside the ceiling law and note should be taken of these suggestions. In brief, the exemption of transactions made through partitions was discriminatory and repugnant to the avowed purpose of the Bill. Further, more, the Government of India was not in favour of disturbing settled and long standing rights in land unless there were compelling reasons and the reasons do not seem to exist in this case.

The legislation in so far as it omits to make provision for payment of compensation at the market value of any estate referred to in the second provision to Article 31-A of the Constitution infracts the guarantee afforded by the said proviso. In view thereof, the Bill to the aforesaid extent would be unconstitutional and that the mere fact of inclusion of the parent Act in the Ninth Schedule (item 46) would not save the amendment proposed to be made."

Thus, it will be seen that the Government of India was not infavour of disturbing settled and long standing rights. It may be pointed out that this is a Bill which was passed unanimously by both Houses of the State Legislature.

Articles 256, 257 *and* 258 :

As stated in page 34 of the report submitted by the State Government under the heading "Administrative Relations" Articles 256, 257, 365 and 356 are the four Articles in the Constitution which have both catalytic and fatalistic effect on the States, in view of the possible unitary exercise of executive power by the Union under those Articles. As stated at page 37 of the Rep rt, the expressions such as—(*a*) as to ensure compliance with the laws made by Parliament and for the issue of directions as may be necessary for that purpose (Article 256).

(*b*) as not to impede or prejudice the exercise of the executive power of the Union and the consequential power to issue directions as may be necessary for that purpose [Article 257 (1)].

(*c*) failure to comply with or to give effect to the directions given by the Union raising a presumption that a circumstance has arisen in which the State cannot be carried on in accordance with the provisions of the Constitution (Article 365).

(*d*) the report of the Governor or the satisfaction otherwise by the President for his assumption of all the functions of the governance of the State (Article 356) comprehend powers reserved by the Union under the Constitution to have an over-riding influence, over the States bringing down the theory of autonomy of States to a catastrophic minimum. This is so because the use of such power during the three decades in the past have *ex-necessitas* demonstrably proves that there has been excessive or misuse of such powers resulting in extra-ordinary steps being taken and the edifice of State autonomy made to crumble. We have already expressed the view that the chain reaction between Articles 256 and 257, 365 and 356, which is in the nature of catalytic influence is bound to result in a fatalistic instrusion into the autonomy of the State. Articles 256, 257, 365 and 356 are therefore to be deleted ; For the hopes of the States in having preserve them as reserve measure have become dupes and as the Administrative Reforms Commission itself said the assumption of governance by the President (under Article 356) has not become exceptional feature but a normal phenomenon and such a drastic medicine prescribed in the Constitution is being administered as daily food as a matter of course instead of being resorted to as a last resort. The Government are also of the view that Articles 357 and 360 should also be omitted.

Planning :

As regards the suggestion made by the Chairman that local bodies can be entrusted with planning and some functions can be processed by the State Government, it is submitted that the various laws governing local bodies provide for this and in particular, the Tamil Nadu Town and Country Planning Act, 1971 (Tamil Nadu Act 35 of 1972) contains provisions regarding the regulation of planning, including planning for the Metropolitan City of Madras.

Entry 52 *of the Union List* :

As stated at pages 17—18 of the Report submitted by the State Government, the Industries (Development and Regulation) Act, 1951, has been passed with reference to this entry and Parliament has brought many items within the scope of this Act with the result that the Legislative power under entry 24 of List II, viz., "Industries subject to the provisions of entries

7 and 52 of List I" becomes actually ineffective because, to the extent Parliament has included any industry within the scope of the Industries (Development and Regulation) Act, 1951 or any other Act under entry 52 as a controlled industry, the legislative competence of the State Legislature is deprived of. This certainly affects the federal structure of the Constitution in the sense that the State Legislature is made incompetent in respect of the controlled industries coming under the Acts enacted by Parliament under entry 52 of List I.

Further, the expression " in public interest " is so wide that any and every industry can be brought within the scope of entry 52. It was for this reason that the Government of Tamil Nadu suggested that the core industy of crucial importance for national development " should be specified in the entry itself and this Government has recast entry 52 as at page 18 of the Report submitted by the State Government. The request of the State Government is that the Commission should make an exercise on this subject and suggest specifically as to what entry should be specified in entry 52 itself. The Chairman's suggestion that if the Commission goes into details, it will be risky, requires reconsideration and the Commission may accept the suggestion of this Government that the entry 52 itself should specify the industries without giving any room for the Parliament or the Central Government to encroach on the Legislative power given to the State Legislature under entry 24 of List II and on the co-extensive executive power of the State Government.